187 (4)

No. 10-738

In the Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred by denying restitution to the victims of a large, multi-billion-dollar fraud scheme under the complexity exception to mandatory restitution under 18 U.S.C. 3663A(c)(3)(B), based in part on the availability of other sources of recovery.

2. Whether the court of appeals erred by failing to "clearly state[] on the record in a written opinion," 18 U.S.C. 3771(d)(3), its reasons for denying petitioners' mandamus petitions.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Arizona v. *Washington*, 434 U.S. 497 (1978) 19
Dolan v. *United States*, 130 S. Ct. 2533 (2010) 4
Ritchie Special Credit Invs., Ltd. v. *United States Trustee*, 620 F.3d 847 (8th Cir. 2010) 2
United States v. *Alalade*, 204 F.3d 536 (4th Cir.), cert. denied, 530 U.S. 1269 (2000) 16
United States v. *Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006) 15
United States v. *Edwards*, 595 F.3d 1004 (9th Cir. 2010) 16
United States v. *Gallant*, 537 F.3d 1202 (10th Cir. 2008), cert. denied, 129 S. Ct. 2026 (2009) 14, 15
United States v. *Hyde*, 497 F.3d 103 (1st Cir. 2007) 16
United States v. *Monzel*, No. 11-3008, 2011 WL 1466365 (D.C. Cir. Apr. 19, 2011) 20
United States v. *Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824 (8th Cir. 2010) 2

Statutes, regulation and rules:

Crime Victims' Rights Act of 2004, 18 U.S.C. 3771 (2006 & Supp. III 2009) 9, 17

Statutes, regulation and rules—Continued: Page

18 U.S.C. 3771(a)(6) 9
18 U.S.C. 3771(d)(3) 9, 12, 16, 17, 19
Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 206(a), 110 Stat. 1232 ..... 2, 12
18 U.S.C. 3663A 2
18 U.S.C. 3663A(a)(1) 4, 12
18 U.S.C. 3663A(c) 15
18 U.S.C. 3663A(c)(1) 12
18 U.S.C. 3663A(c)(1)(A)(ii) 4, 6, 12, 15
18 U.S.C. 3663A(c)(3) 6, 15
18 U.S.C. 3663A(c)(3)(B) 6, 7, 9, 12, 15
18 U.S.C. 3664 4
18 U.S.C. 3664(f)(1)(A) 4, 16
18 U.S.C. 3664(f)(1)(B) 4, 11, 14, 15
28 C.F.R. Pt. 9 8
8th Cir. R.:
Rule 32.1A 14
Rule 47B 14

In the Supreme Court of the United States

No. 10-738

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgments of the court of appeals (Pet. App. 1-2, 3-5) are unreported. The orders of the district court (Pet. App. 6-18, 19-20, 21-22) are not published but the order in the lead case (Pet. App. 6-18) is available at 2010 WL 2291486.

JURISDICTION

The judgments of the court of appeals were entered on August 3, 2010, and September 24, 2010. On October 21, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari from the August 3 judgment to and including December 1, 2010. The petition for a writ of certiorari was filed on December 1,

2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek this Court's review of judgments arising from seven related but separate federal prosecutions in the United States District Court for the District of Minnesota. In the lead case, Thomas Petters was convicted after a jury trial on 20 counts of wire and mail fraud, money laundering, and conspiracy in connection with a massive, multi-billion-dollar Ponzi scheme that he orchestrated. Six of his associates (co-defendants) were convicted in six separate cases after pleading guilty to various offenses in connection with that scheme. Petitioners are investment funds and a fund manager who were victims of the fraudulent scheme. In each of the seven prosecutions, the district court declined to order restitution for any of the defendants' putative victims under the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 206(a), 110 Stat. 1232 (18 U.S.C. 3663A). See Pet. App. 6-18, 19-20, 21-22. The court of appeals denied mandamus relief. *Id.* at 1-2, 3-5.

1. Petters was a well-known Minneapolis businessman who owned numerous businesses, including the Polaroid Corporation; Sun Country Airlines; Petters Group Worldwide LLC; and Petters Company, Inc. (PCI). Gov't C.A. Br. at 22, *United States* v. *Petters*, No. 10-1843 (8th Cir.) (Gov't *Petters* Br.). In the late 1980s, Petters began orchestrating a massive Ponzi scheme by borrowing large amounts of money from banks and investors to leverage other transactions. *Id.* at 22-27. Between February and May 2008, while the Nation was experiencing an economic downturn and credit crisis, petitioners loaned roughly $189 million to Petters and

his companies in a series of short-term promissory notes supported by security interests in business assets. Pet. 3; see *United States* v. *Ritchie Special Credit Invs. Ltd.*, 620 F.3d 824, 827-828 (8th Cir. 2010) (*Ritchie I*) (noting that the security interests were challenged in bankruptcy proceedings).

In September 2008, Deanna Coleman, a PCI employee, informed the Department of Justice that she had been assisting Petters in a multi-billion-dollar fraud for more than ten years. Gov't *Petters* Br. 1, 22-23. The government subsequently initiated civil and criminal actions against Petters, his businesses, and several of his associates. In October 2008, the government commenced a civil, anti-fraud action for injunctive relief in which it obtained court orders (1) freezing Petters's and his co-defendants' assets; (2) placing the assets in receivership; (3) appointing a receiver to protect the assets; and (4) staying all civil litigation by creditors, victims, and others against Petters or his companies. See *id.* at 4; *Ritchie I*, 620 F.3d at 828; *Ritchie Special Credit Invs., Ltd.* v. *United States Trustee*, 620 F.3d 847, 850-851 (8th Cir. 2010). The receiver then initiated Chapter 11 bankruptcy proceedings for at least ten of the business entities associated with Petters. See *id.* at 851 & n.5.

2. The government brought separate criminal prosecutions in the District of Minnesota against Petters (No. 08-cr-364) and, as relevant here, six of his associates: Robert White (No. 08-cr-299), Michael Catain (No. 08-cr-302), Deanna Coleman (No. 08-cr-304), Larry Reynolds (No. 08-cr-320), Harold Katz (No. 09-cr-243), and Gregory Bell (No. 09-cr-269). The district court in each of those seven, separate cases declined to order the defendants to pay restitution. Pet. App. 6, 19, 21.

The MVRA generally requires—with a statutory exception discussed below—that the district court "order * * * that the defendant make restitution to the victim" if the defendant is convicted of a qualifying federal offense, including "any [property] offense committed by fraud or deceit." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii). A district court ordering restitution under the MVRA or other statutory authority must "order restitution * * * in the full amount of each victim's losses as determined by the court," 18 U.S.C. 3664(f)(1)(A), and, "in determining the amount of restitution," may not consider the "fact that a victim has received or is entitled to receive compensation" from "any other source." 18 U.S.C. 3664(f)(1)(B). If the victim's losses are not ascertainable by a date ten days before sentencing, the court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). See generally *Dolan* v. *United States*, 130 S. Ct. 2533, 2538-2541 (2010) (concluding that a court's failure to comply with the 90-day deadline "does not deprive the court of the power to award restitution").

a. After the jury verdict finding Petters guilty but before sentencing, the government moved to defer the issue of restitution until 60 to 90 days after sentencing because of the difficulty of identifying all of the victims and their respective losses from Petters's extensive and lengthy scheme. 08-cr-364 Doc. 370, at 1-2. The district court granted that motion. 08-cr-364 Doc. 375.

On April 8, 2010, the district court sentenced Petters to 50 years of imprisonment and ordered Petters to forfeit to the United States specified property plus a $3.522 billion forfeiture judgment. 08-cr-364 Doc. 400, at 2, 6 (judgment incorporating preliminary order of forfeiture,

08-cr-364 Doc. 395).[1] On the same day, the court granted the government's request to establish a restitution schedule by setting a restitution hearing for June 9, 2010; directing the government to file a preliminary proposed restitution order six weeks beforehand; permitting victims a two-week period to submit objections to the government; requiring the government to file a final proposed restitution order after considering those objections and to provide the court with any unresolved objections; and permitting the defendants to object to the final proposal before the June 9 hearing. 08-cr-364 Doc. 398.

Meanwhile, the Probation Office had prepared a presentence investigation report (PSR) that identified 338 victims—including individuals, hedge funds, retirement funds and other sophisticated business entities—eligible for restitution. Pet App. 7 & n.3. Although the PSR estimated the total amount of restitution at $1.8 billion, it specified a loss amount for only about half of the listed victims (the victims that had contacted the probation officer) and failed to identify any loss amount for the others. *Id.* at 7; PSR ¶ 188; *id.* at S.1-S.9 (victim list).

On April 28, 2010, the government filed its preliminary proposed restitution order, which listed 434 victims and sought nearly $2 billion in restitution. 08-cr-364 Docs. 410 and 411. The government used a "cash in/cash out" methodology to determine victim status by calculating the funds invested by a potential victim and subtracting any payments that the individual or entity had received back. Pet. App. 9 n.5. As a result of that meth-

---

[1] Petters's appeal from his conviction and sentence is pending. *United States* v. *Petters*, No. 10-1843 (8th Cir.) (argued Feb. 17, 2011).

odological approach, the government's restitution list identified a different set of victims and different amounts owed those victims than the PSR had done. *Id.* at 8. The government noted that some of the information was different from that in the PSR, but explained that it had used the information "currently available," some of which "may be incomplete." *Ibid.* Nearly 100 victims subsequently submitted objections to the government. See *id.* at 8-9. After considering those objections, the government filed its final proposed restitution order, which accepted some of those objections, included approximately 40 newly identified victims, and sought more than $2.5 billion in restitution. *Id.* at 9; 08-cr-364 Doc. 456 & Exh. A. Petitioners objected to that final proposal on the ground that it should have been limited to victims who directly invested in or loaned money to Petters. 08-cr-364 Doc. 461.

b. On June 3, 2010, six days before the scheduled restitution hearing date, the district court, acting *sua sponte*, issued an order declining to order restitution for any of the victims. Pet. App. 6-18. The court based its order on 18 U.S.C. 3663A(c)(3), which provides an exception from the MVRA's general requirement of mandatory restitution in certain contexts. See Pet. App. 17. The exception provides that the MVRA shall not apply in cases involving certain offenses against property, including "any offense committed by fraud or deceit," 18 U.S.C. 3663A(c)(1)(A)(ii), if the court finds, from facts on the record, that "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3)(B).

The court explained that although the MVRA generally requires district courts to order restitution in cases covered by the statute, "Congress [had] made clear" through the complexity exception in Section 3663A(c)(3)(B) that "district courts should not be saddled by complicated fact-finding with regard to victim loss when ordering restitution." Pet. App. 12-13. Such efforts run the risk, the court observed, of improperly converting sentencing proceedings into "complicated, prolonged trials" and embroiling sentencing courts in "'intricate issues of proof' related to restitution." *Id.* at 13 (emphasis and citations omitted). The exception's textual requirement that the sentencing court determine that "complex issues of fact related to the cause or amount of the victim's losses" would so "complicate or prolong the sentencing process" that "the need to provide restitution to any victim is outweighed by the burden on the sentencing process," *id.* at 12-13 (quoting 18 U.S.C. 3663A(c)(3)(B)), the court concluded, requires that courts to "weigh[]" the "burden of adjudicating the restitution issue" against the "desirability of immediate restitution," *id.* at 16 (emphasis omitted). The district court found that the exception's application to this case to be "particularly apt." *Id.* at 14.

First, the district court concluded that the burden of determining restitution here "would be significant." Pet. App. 16. The court noted that Petters's five-week trial "involved scores of boxes (and millions of pages) of documents" and explained that the "evidentiary hearings" needed to resolve objections to the government's proposed restitution order in this "multi-billion-dollar" fraud case involving nearly 500 identified victims would be "a lengthy and complicated process at best." *Id.* at 6 n.2, 8-9 & n.4, 12. Ordering restitution "would take sig-

nificant time and would be inherently complex," requiring, in the court's estimation, "*at least*" two additional months beyond that already invested "to marshal the necessary evidence, resolve all of the many pending objections, and determine the appropriate amount of restitution for each victim." *Id.* at 14. Such a process, the court concluded, would "prolong[] the matter for an intolerable period of time." *Id.* at 17 (citation and brackets omitted).

On the other side of the balance, the court found that "the burden imposed on the victims by declining restitution would not be overwhelming." Pet. App. 17. It explained that the "end result would be meager" even if it were to "wade into this thicket in an attempt to determine the appropriate amount of restitution for each victim" because the victims would "at best" recover "something less than a penny for each dollar of victim loss." *Id.* at 14-15 (noting that assets available for restitution totaled roughly $10-$20 million for the "more than $2 billion in restitution sought"). The "probable value" of restitution, the court concluded, was therefore "limited." *Id.* at 15. Moreover, restitution would likely leave the most needy victims—"unsophisticated individual investors who saw their life savings" dissolve—to "recover the smallest amounts" because institutional "hedge funds and similar entities" suffered "the vast majority of losses." *Ibid.* In other words, the "benefits of a restitution order * * * would be minimal in the overall scheme of this case." *Id.* at 17.

Finally, the district court "note[d]" that "alternative avenues of recovery are available to victims." Pet. App. 15. The government, it observed, had indicated that it would invoke its authority under 28 C.F.R. Part 9 "to remit forfeited assets" to victims to "make up for [their]

loss[es]." Pet. App. 15 & n.9. That process would provide victims with the "opportunity to seek restitution from the same funds from which the Court-ordered restitution would be made." *Id.* at 15-16. The district court also noted that "bankruptcy proceedings involving [Petters's] companies are currently pending"; that the United States Trustee "plans to assist all victims . . . in filing a bankruptcy claim"; that "many victims have already asserted [bankruptcy] claims"; and that "the funds available for distribution in the bankruptcy proceedings likely will far outpace those available here" because "'clawbacks' and similar litigation are to take place" in the bankruptcy. *Id.* at 16-17.

The district court accordingly held that Section 3663A(c)(3)(B)'s exception applied in the *Petters* case and emphasized that its decision was "base[d] * * * on the complexity and length of the restitution process." Pet. App. 17, 18 n.11.

c. The Crime Victims' Rights Act of 2004 (CVRA), 18 U.S.C. 3771 (2006 & Supp. III 2009), provides crime victims with a series of statutory rights, including the "right to full and timely restitution as provided in law," 18 U.S.C. 3771(a)(6). The CVRA states that such rights "shall be asserted in the district court in which a defendant is being prosecuted" and specifies that the "district court shall take up and decide any motion asserting a victim's right forthwith." 18 U.S.C. 3771(d)(3). "If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus" and the court of appeals must decide the petition "within 72 hours after the petition has been filed." *Ibid.* "If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." *Ibid.*

Petitioners did not file a motion in district court in the *Petters* case asserting a right to restitution under the CVRA or MVRA, either before or after the district court's June 3, 2010, restitution order. On June 10, 2010, six of the eight petitioners in this Court (Pet. ii) nevertheless petitioned the court of appeals for a writ of mandamus to vacate the restitution order; to direct the district court "to trim the list of victims to 'direct victims,'" *i.e.*, victims "who were parties to promissory notes signed by Petters and/or his companies" or can "show standing to file some other cause of action against Petters"; and to require the court to hold a restitution hearing to determine their losses. 10-2286 Mandamus Pet. i-ii, 29.

d. In separate prosecutions, Petters's six associates pleaded guilty and were convicted. Gov't *Petters* Br. 3-4, 14-15, 19-20. The district court entered two orders declining to order restitution in those cases, expressly adopting and incorporating its restitution order in *Petters*. First, on June 4, 2010, the court declined to order restitution in *White*, *Catain*, *Coleman*, and *Reynolds*. Pet. App. 19-20. Six of the eight petitioners in this Court then petitioned the court of appeals for a writ of mandamus to vacate the June 4 order. 10-2365 Mandamus Pet. i-ii, 1, 24. Second, on July 2, 2010, the district court declined to order restitution in *Katz* and *Bell*. Pet. App. 21-22. Petitioners again filed a mandamus petition in the court of appeals, now seeking vacatur of the July 2 order. 10-2582 Mandamus Pet. 1, 23. Petitioners did not file a district court motion in any of the six cases asserting a right to restitution under the MVRA or CVRA before they petitioned for mandamus relief.

3. On August 3, 2010, the court of appeals denied petitioners' three mandamus petitions in a consolidated judgment. Pet. App. 3-5. The judgment (from which petitioners now seek review) states: "The petitions for writ of mandamus have been considered by the court and are denied." *Id.* at 4.

4. Meanwhile, sentencing proceedings continued in Petters's co-defendants' cases. Petitioners submitted a motion in the six cases involving Petters's co-defendants (but not in *Petters* itself) seeking vacatur of the restitution orders in those cases. See 08-cr-304 Doc. 34, at 1-2, 19-20 (docketed only in *Coleman*). Petitioners dedicated one half of one sentence to assert in passing that "the fact that a victim is entitled to compensation from other sources may not even be considered in determining restitution. 18 U.S.C. § 3664(f)(1)(B)." *Id.* at 12. During Coleman's sentencing hearing the district court appears to have orally denied that motion, at least in the context of the *Coleman* case. See Pet. App. 26-27. Petitioners then filed their (fourth) mandamus petition in the court of appeals, challenging "the September 2 order denying [petitioners'] motion vacate" the restitution orders. 10-3050 Mandamus Pet. i, 2.

5. On September 24, 2010, the court of appeals denied mandamus relief. Pet. App. 1-2. The court's judgment (again issued without calling for the government to respond and without an accompanying opinion) states that the "[p]etition for mandamus has been considered by the court and is denied." *Id.* at 1.

ARGUMENT

Petitioners present two questions for this Court's review: first, whether a district court may deny restitution based on the availability of alternative avenues for

victims to secure recovery (Pet. 9-22); and, second, whether the court of appeals' summary denial of petitioners' mandamus petitions violated the "written opinion" requirement in 18 U.S.C. 3771(d)(3) (Pet. 22-24). No review is warranted. This case does not squarely present the first question, and the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. With respect to the second question, the statutory requirement of a "written opinion" does not apply to court of appeals' denial of petitioners' first three mandamus petitions, and to the extent that it applies in part to the court's denial of petitioner's fourth mandamus petition, no review is warranted. The court of appeals did not err in denying mandamus relief, and there is no indication that its disposition without an opinion reflects a recurring, systemic problem that would warrant certiorari review.

1. Section 206(a) of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, generally requires that a district court order restitution to a victim when the defendant is convicted of a qualifying federal offense, 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1), but specifies that that requirement does not apply in cases involving certain property offenses "if the court finds, from facts on the record, that * * * determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3)(B); see 18 U.S.C. 3663A(c)(1)(A)(ii). Petitioners assert that the "district court here held that the burden of determining the amount of restitution due would outweigh 'the need to provide restitution' because 'alternative avenues of

recovery are available to victims.'" Pet. 10 (quoting Pet. App. 15). Petitioners then contend (Pet. 9-22) that review is warranted because the court of appeals "summarily ratified" the district court's holding and that decision "implicates an acknowledged circuit split." Pet. 10. Petitioners are incorrect. No review is warranted for multiple reasons.

a. First, this case does not squarely present the question that petitioners frame. The district court did not, as petitioners contend, hold that "the burden of determining the amount of restitution due would outweigh 'the need to provide restitution' because 'alternative avenues of recovery are available to victims,'" Pet. 10 (quoting Pet. App. 15). Rather, the district court invoked the MVRA's complexity exception because the burden of calculating restitution for nearly five hundred victims in this sprawling, multi-billion-dollar fraud outweighed the need to order what ultimately would be a "meager" restitution recovery, involving, "at best, * * * less than a penney for each dollar of victim loss." Pet. App. 14-15. The court went on to "note[]" in the following paragraph that "alternative avenues of recovery are available to victims." *Id.* at 15. But that was not the determining factor in the court's holding. While the court referred to both factors in its ensuing discussion, *id.* at 16-17, the court's judgment was independently supported by its conclusion that the delay and burden in determining restitution would outweigh the need to provide what would, at the end of the day, be restitution for only a tiny fraction of losses that would largely bypass "the victims needing it most." *Id.* at 15.

The court of appeals' unelaborated judgments denying mandamus relief (Pet. App. 1-2, 3-5) provides no occasion for resolving the question petitioners present.

The court of appeals need not have conducted de novo review to deny mandamus relief and therefore need not have accepted the district court's rationale in its entirety to dispose of these cases. It would have been sufficient for the court to find no abuse of discretion, which was clearly the case in view of the massive labor entailed in quantifying victim losses for relatively small returns. In any event, the court of appeals' judgments were issued without opinions and, for that reason, do not constitute precedential rulings that might resolve a question warranting this Courts' review. See 8th Cir. R. 32.1A, 47B.

b. Even if the court of appeals had embraced the view that a district court "may deny restitution under the MVRA based on the availability of other remedies for possible victim compensation," Pet. 10, such a holding would not warrant the Court's review because it would not conflict with any decision of this Court or any other court of appeals. The only circuit squarely to address the issue has held that district courts are not "barred from considering the existence of [such alternative remedies] in determining whether to invoke the MVRA's complexity exception." *United States* v. *Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008), cert. denied, 129 S. Ct. 2026 (2009).

In *Gallant*, the Tenth Circuit explained that MVRA prohibits district courts from considering the fact that a victim has received, or may receive, compensation from other sources "in determining the amount of restitution," 18 U.S.C. 3664(f)(1)(B), but it concluded that that prohibition "relates to *how much* restitution should be awarded once the sentencing court has determined that an award is required," not "*whether* a court must provide a restitution award." 537 F.3d at 1253. The

MVRA's complexity exception, *Gallant* reasoned, concerns only the former and, for that reason, it is unaffected by the prohibition in Section 3664(f)(1)(B). *Ibid.*

Although *Gallant* stated (537 F.3d at 1253 n.36) that its conclusion "may conflict" with the Ninth Circuit's decision in *United States* v. *Cienfuegos*, 462 F.3d 1160 (2006), the two decisions do not conflict. In *Cienfuegos*, the district court denied the government's request for restitution in the form of lost earnings for the family of a murder victim, based on the district court's view that "the complexities associated with determining future lost income belong in a civil action brought by the survivors." *Id.* at 1161-1162. The Ninth Circuit reversed because the "MVRA made the 'complexity exception' inapplicable to crimes of violence" like murder. *Id.* at 1168; see *ibid.* (explaining that Section 3663A(c)(3)(B) extends the exception only to "offenses listed under 18 U.S.C. § 3663A(c)(1)(A)(ii)"). That ruling reflects the statute's text: the complexity exception expressly applies only to offenses "described in paragraph (1)(A)(ii)" of Section 3663A(c), see 18 U.S.C. 3663A(c)(3), and that paragraph encompasses only certain "offense[s] against property," 18 U.S.C. 3663A(c)(1)(A)(ii), not crimes of violence.

The *Cienfuegos* court noted that, "[i]n addition," the "the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution" under the MVRA. 462 F.3d at 1168. But, as *Gallant* recognized, that aspect of the decision "is somewhat ambiguous" because it focuses on "*the amount of restitution*," rather than on whether the MVRA requires the court to enter any order of restitution (regardless of amount). *Gallant*, 537 F.3d at 1254 n.36. The Ninth Circuit has yet to confront that ambiguity or consider

Gallant's analysis. *Cienfuegos* thus does not create a clear conflict of authority that would warrant review.[2]

Petitioners suggest (Pet. 11-12) that decisions by the First and Fourth Circuits reflect a circuit conflict, but neither even addresses the MVRA's complexity exception. In *United States* v. *Alalade*, 204 F.3d 536 (4th Cir.), cert. denied, 530 U.S. 1269 (2000), the court held that where a court actually awards restitution, 18 U.S.C. 3664(f)(1)(A) prohibits the court from reducing the *amount* of that restitution by the value of property seized and retained in administrative forfeiture by the government. *Id.* at 540; see *id.* at 540-541 (holding that "the district court lacked discretion under the MVRA to order restitution in this case in an amount less than the full amount of each [victim's] loss by allowing an offset for the value" of the seized property). *United States* v. *Hyde*, 497 F.3d 103 (1st Cir. 2007), is even further afield. The court in *Hyde* concluded that statutory provisions governing the *enforcement* of a previously entered restitution order were not limited by a state-law exemption that normally would exempt property from the reach of bankruptcy creditors. *Id.* at 107-108. In short, petitioner identifies no division of authority that might warrant review.

2. Petitioners contend (Pet. 22-24) that the court of appeals' two summary denials of their mandamus petitions violate the "written opinion" requirement of 18 U.S.C. 3771(d)(3). That requirement did not apply to

---

[2] Petitioners' reliance (Pet. 11) on *United States* v. *Edwards*, 595 F.3d 1004, 1013 & n.3 (9th Cir. 2010), underscores the absence of Ninth Circuit precedent on point. *Edwards*, which discusses the MVRA in the context of a bankruptcy case simply to contrast the MVRA's provisions with the principles governing a bankruptcy court, does not even address the MVRA's complexity exception. *Ibid.*

the first denial (Pet. App. 3-5) and, although the court of appeals should have issued an opinion when denying petitioner's fourth mandamus petition (*id.* at 1-2), that isolated failure does not warrant this Court's review.

a. The Crime Victims' Rights Act of 2004, 18 U.S.C. 3771 (2006 & Supp. III 2009), provides crime victims with a series of statutory rights that must "be asserted in the district court," which must promptly "decide any [such] motion." 18 U.S.C. 3771(d)(3). The CVRA states that "*[i]f* the district court *denies* the relief sought, the *movant* may petition the court of appeals for a writ of mandamus." *Ibid.* (emphasis added). The court of appeals must then decide such a petition "within 72 hours" and, if it denies mandamus relief, must state its reasons "in a written opinion." *Ibid.* The CVRA's "written opinion" requirement thus applies only to mandamus petitions filed by a litigant (the district court "movant") who filed a district court motion asserting rights under the CVRA that the district court denied. Petitioners did not file any such motion to support their first three mandamus petitions, see pp. 10-11, *supra*, and, for that reason, the court of appeals was not obliged to issue a written opinion to explain its judgment (Pet. App. 3-5) denying the petitions.[3] Indeed, petitioner appears to have acknowledged as much below. See 10-3050 Mandamus

---

[3] Six of the eight petitioners in this Court submitted a letter dated June 11, 2010, to the district court in *White*, *Catain*, *Coleman*, and *Reynolds* "ask[ing]" that the district court act "sua sponte" to "vacate [its] order denying restitution on behalf of Petters's codefendants." 08-cr-299 Doc. 33, at 1-2 (letter filed Sept. 8, 2010); see 08-cr-302 Doc. 45 (same); 08-cr-304 Doc. 39 (same); 08-cr-320 Doc. 47 (same). That letter was not at the time docketed by the district court, which does not appear to have treated petitioners' suggestion that the court itself act *sua sponte* as a motion for relief warranting adjudication.

Pet. 2, 8 (stating that petitioners "presume[d]" that their three mandamus petitions were denied because petitioners "did not have a record that [they] had first filed a motion asserting CVRA rights in the district court which had been denied"). No further review of that judgment is warranted.

b. After their first three mandamus petitions were denied, petitioners submitted a motion in district court in six of the cases at issue (not the *Petters* case) asserting rights under the CVRA. See 08-cr-304 Doc. 34, at 1-2, 19-20 (docketed only in *Coleman*). On September 2, 2010, the district court appears to have orally denied that motion at least in the context of the *Coleman* prosecution. Pet. App. 26-27 (*Coleman* sentencing hearing transcript).[4] The court of appeals later denied petitioners' (fourth) mandamus petition resulting from that September 2 ruling. Pet. App. 1-2; p. 11, *supra*. The court of appeals should have issued at least a brief, written opinion to explain its judgment denying mandamus relief to the extent that it denied relief in the six cases involving Petters's co-defendants.[5] Although the court

---

[4] No separate order denying the motion was entered or noted in *Coleman* or in any other related case.

[5] If the court of appeals had denied mandamus relief in Petters's case, the CVRA would not have required the court to explain its denial because petitioners never filed a district court motion that would have triggered that obligation. And with respect to the cases in which petitioners properly filed such a motion, the "written opinion" requirement does not necessarily require the court of appeals to issue a lengthy decision (particularly in view of the rapid 72-hour window within which such decisions must be issued). Nor does it otherwise prevent a court, in an appropriate case, from indicating that it adopts the reasoning of the lower court or accepts the arguments and positions advanced by a respondent's court-ordered answer to the mandamus petition. The court of appeals' failure here to provide any reasons for

of appeals erred in that regard, certiorari review in this case is not warranted.

This Court's review is not necessary to clarify the law. Section 3771(d)(3) unambiguously requires a court of appeals to issue a written opinion when it denies relief to a litigant who has properly sought mandamus review from the district court's denial of its CVRA motion. Although the court of appeals overlooked that clear requirement in this case, nothing suggests that that failure reflects a recurring, systemic problem that would warrant review. The more appropriate means for correcting such an isolated, case-specific error in an unpublished judgment by the court of appeals would have been for petitioners to bring that error to the panel's attention in a rehearing petition.

Although this Court of course has discretion to grant certiorari, vacate the court of appeals' September 24, 2010, judgment, and remand (GVR) in order to correct the court of appeals' failure to explain that judgment, that course is unwarranted here because it would not alter the underlying judgment denying mandamus relief.[6] The United States sought restitution on behalf of nearly 500 victims in the prosecutions at issue, which involve a massive, multi-billion-dollar fraudulent scheme. Notwithstanding the government's request, the district court permissibly determined that the substantial burden of determining the amount of restitution

---

its judgment, however, is insufficient.

[6] Cf. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978) (state court's decision to grant the prosecution's request for a mistrial is not constitutionally defective because of the court's "failure to explain [its] ruling" by articulating the factors informing "the deliberate exercise of [its] discretion" if the "record provides sufficient justification" for the ruling).

owed to each victim and resolving the numerous objections to the government's proposed restitution order would take a significant amount of time, would be inherently complex, and would impose a significant burden that would intolerably delay the sentencing process. See pp. 7-8, *supra*. In light of the meager restitution that would be recovered, the district court determined that the "need to provide restitution" was "outweighed by the burden it would impose" on the sentencing process. Pet. App. 17; see *id.* at 19-22 (incorporating that conclusion). That did not reflect an abuse of discretion, and, for that reason, the court of appeals did not err in denying mandamus relief in this case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

MAY 2011

---

[7] Petitioners argued below that the district court's application of the MVRA's complexity exception should be reviewed for an abuse of discretion and not the higher standard traditionally applied to mandamus relief. 10-3050 Mandamus Pet. 10-12, 17-21. The courts of appeals are divided over whether traditional mandamus standards apply in the CVRA context. See *United States* v. *Monzel*, No. 11-3008, 2011 WL 1466365, at *3 (D.C. Cir. Apr. 19, 2011) (noting conflict). Even under the lower standard that petitioner suggests, the court of appeals did not err in denying mandamus relief in this case.